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04-44 JUL 7 2004

No. 04-_____

IN THE

Supreme Court of the United States

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Petitioner,

v.

THOMAS RAMSEY,

Respondent.

On Petition for Writ of Certiorari to the Missouri Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court determining damages for lost wages under the Federal Employers' Liability Act must admit evidence that the employee's gross income would have been reduced by federal railroad retirement taxes.

RULE 29.6 STATEMENT

Petitioner The Burlington Northern and Santa Fe Railway Company is a wholly owned subsidiary of Burlington Northern Santa Fe Corporation.

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The Burlington Northern and Santa Fe Railway Company respectfully petitions for a writ of certiorari to review the judgment of the Missouri Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals is reported at 130 S.W.3d 646 (Mo. App. 2004) and is included in the Appendix at App. 1a-15a. The unpublished order of the Missouri Supreme Court denying BNSF's application for transfer is not reported and is included in the Appendix at 16a.

JURISDICTION

The decision of the Missouri Court of Appeals was entered on February 3, 2004. BNSF filed an application to transfer the case to the Supreme Court of Missouri. The Missouri Supreme Court denied the application on April 27, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The Federal Employers' Liability Act ("FELA") provides, in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States ... shall

> be liable in damages to any person suffering injury while he is employed by such carrier in such commerce ... for such injury or death resulting in whole or in part from the negligence of ... such carrier, or by reason of any defect or insufficiency, due to its negligence, in its [equipment].

45 U.S.C. § 51.

The Railroad Retirement Tax Act provides, in pertinent part:

> Rate of Tax
>
> (a) Tier 1 tax.--In addition to other taxes, there is hereby imposed on the income of each employee a tax equal to the applicable percentage of the compensation received during any calendar year by such employee for services rendered by such employee. For purposes of the preceding sentence, the term "applicable percentage" means [7.65%] under subsections (a) and (b) of section 3101 for the calendar year.
>
> (b) Tier 2 tax.--
>
> (1) In general.--In addition to other taxes, there is hereby imposed on the income of each employee a tax equal to the applicable percentage of the compensation received during any calendar year by such employee for services rendered by such employee.
>
> (2) Applicable percentage.--For purposes of paragraph (1), the term "applicable percentage" means--(A) 4.90 percent in the case of compensation received during 2002 or 2003, and (B) in the case of compensation received during any calendar year after 2003, the percentage determined under section 3241 for such calendar year.

26 U.S.C. §§ 3201(a), (b).

STATEMENT

In *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490 (1980), the Court addressed how federal income taxes should be treated in a claim for lost wages under the FELA. This Court held that federal income taxes should be subtracted from gross wages, because after-tax income yields the only realistic estimate of the wage earner's ability to support his family. Since *Liepelt*, a similar issue has arisen with respect to railroad retirement taxes. These federal taxes, analogous to Social Security taxes, comprise 12.55% of an railroad employee's earnings -- often more than the income taxes at issue in *Liepelt*. Some courts have held that the same logic applies to these taxes. However, other courts, particularly state courts, have refused to deduct railroad retirement taxes from gross income in computing damages. This refusal to admit evidence of railroad retirement taxes allows the employee to be overcompensated by recovering the 12.55% of his income that he concededly never would have received had he been able to work. This petition presents the question of whether a court can exclude evidence of the effect of railroad retirement taxes on the employee's future earnings.

A. Railroad Retirement Taxes

The Railroad Retirement Act (RRA) is "substantially a Social Security Act for employees of common carriers," including railroads. *Eichel v. New York Central R.R. Co.*, 375 U.S. 253, 254 (1963). Railroad retirement taxes are paid by the employee and employer to fund the retirement benefits. Like other taxes paid on earnings, the employee's portion of the railroad retirement tax is withheld from the employee's paycheck and thus is money that the employee does not take home for the support of his family. *See* 26 U.S.C. § 3201(a); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 574-75 (1979); *Eichel*, 375 U.S. at 254. Similarly, the

employer's portion of the railroad retirement tax is paid directly to the federal government. 26 U.S.C. § 3202(a).

The amount of railroad retirement taxes to be paid by each employee and his employer is fixed by statute, and is therefore easily ascertainable. Exactly as in Social Security, the employer and employee each pay 7.65% of the employee's compensation for Tier I taxes. The employee pays an additional 4.9% for Tier II, or a total for all Railroad Retirement Board taxes of 12.55% of his or her gross wages. The employer pays an additional 15.6% of the employee's gross compensation for Tier II taxes, so that the employer pays directly to the Railroad Retirement Board an additional amount totaling 23.25% beyond the gross compensation paid to the employee. Like the Social Security System for non-railroad workers, the payment of Tier I and Tier II railroad retirement taxes is mandatory, not discretionary.[1]

The amount paid in railroad retirement taxes bears no relation to the amount of the employee's annuity. "Like a social welfare or insurance scheme, the [railroad retirement] taxes paid by and on behalf of an employee do not necessarily correlate with the benefits to which the employee may be entitled." *Hisquierdo*, 439 U.S. at 574-75. There is no separate amount of money set aside in each employee's name. Instead, the federal taxes merely entitle the employee to draw benefits at some future point in accordance with a set formula. Those benefits are established and can be modified by Congress. They are not related to the amount of taxes paid into the fund. *See id.*

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[1] *See* 26 U.S.C. § 3201 ("there is hereby imposed on the income of each employee a tax"); *id.* § 3221 ("there is hereby imposed on every employer an excise tax").

B. The Proceedings Below

Respondent Thomas Ramsey instituted this action under the FELA against his employer, petitioner BNSF, for injuries he sustained after falling on a locomotive walkway. App. 3a. FELA grants railroad employees, and their beneficiaries, a federal right to recover "damages" from their employers for injuries or deaths caused, "in whole or in part [by] the negligence of any of the [railroad's] officers, agents, or employees ...." 45 U.S.C. § 51. The jury found BNSF negligent in the maintenance of the walkway, and that ruling is not challenged here. App. 4a.

On damages, Ramsey introduced evidence of his work-life expectancy and annual gross earnings in order to demonstrate his estimated lost future income. App. 3a-4a. Ramsey did not proffer any evidence of his loss of any railroad retirement pension annuity under the RRA, nor did BNSF ever object to the introduction of such evidence. App. 8a. BNSF contended that the impact of railroad retirement taxes should be considered in calculating Ramsey's lost future wages, and therefore sought to present evidence of the amount of railroad retirement taxes that would regularly have been deducted from his paycheck until his presumed date of retirement. App. 7a. Thus, BNSF proffered evidence showing that Ramsey paid $6,535, $6,069, $6,109 and $5,850 in railroad retirement taxes in the years 1996, 1997, 1998 and 1999. The trial court refused to permit this evidence. App. 3a-4a.

BNSF also argued that it should be allowed to show benefits Ramsey actually received from the Board. Ramsey qualified for and was receiving a Railroad Retirement Board Disability pension which was $24,000 annually, approximately 50% of his former annual earnings. 45 U.S.C. § 231a(a). The trial court refused to permit a showing of this benefit received, while at the same time permitted Ramsey to claim as a loss the railroad retirement taxes. App. 3a-4a.

Finally, BNSF proposed an instruction based on *Liepelt* that said: "The measure of plaintiff's wage loss must be calculated from his after-tax income." App. 12a. The trial court refused to give this instruction. *Id.* The jury awarded Ramsey $1.4 million in a general verdict. App. 4a.

The Missouri Court of Appeals affirmed. App. 1a-15a. The court recognized that, under *Liepelt*, "plaintiff's after-tax income, not his gross income, ... is the proper measure of damages." App. 7a. However, the court viewed *Leipelt* as applicable only to "income taxes ... and not railroad retirement taxes, which are of a different character" because they are paid in part toward the retirement annuity. *Id.* The court of appeals found that the trial court was not required to admit evidence of railroad retirement taxes because Ramsey had made "no claim for lost retirement benefits." App. 8a.

BNSF also argued on appeal that, by claiming damages for taxes payable to the Railroad Retirement Board, Ramsey had "opened the door" to testimony concerning benefits received from the Board. Specifically, the railroad argued that it should have been allowed to establish for the jury that Ramsey was actually receiving monthly railroad disability benefits from the Board. The court refused this request as well. App. 11a. Finally, the court of appeals rejected BNSF's proposed instruction, directing the jury to take into account only after-tax income. The court asserted that *Liepelt* "dealt only with the taxability of the jury's award" and said "nothing about deducting income taxes from wage loss calculations." App. 12a-13a. The court alternatively held that BNSF suffered no prejudice from the refusal to give that instruction. App. 13a.[2]

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[2] The court of appeals remanded for the ministerial task of reducing the judgment by the amount that the railroad has already paid toward Ramsey's medical expenses. App. 14a-15a. The trial

(Continued ...)

Pursuant to Missouri procedure, BNSF filed in the Missouri Court of Appeals an application to transfer the case to the Missouri Supreme Court. When this application was denied, App. 17a, BNSF applied directly to the Missouri Supreme Court. This application was also denied. App. 16a.

REASONS FOR GRANTING THE PETITION

The decision of the Missouri Court of Appeals raises a significant question with respect to the uniform calculation of damages under the Federal Employers' Liability Act and similar federal statutes. The court refused to permit the subtraction of payroll taxes -- in this case, railroad retirement taxes -- in determining future income streams. That ruling is flatly inconsistent with the principles set forth in *Liepelt* and subsequent decisions of this Court.

The decision below also deepens the disagreement among the state and federal courts in their interpretation of *Liepelt*. Two federal circuits, at least three state courts and several federal district courts have held that payroll taxes, such as social security and the railroad retirement taxes, must be deducted in determining lost wages. Four state courts, however, have rejected this view. Other courts, including the court below, have adopted still another view and ruled that evidence of railroad retirement taxes does not have to be admitted when the employee makes no claim for lost retirement benefits. Thus, the courts are in disarray in their

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court entered a revised judgment on June 7, 2004. The remand order does not affect the finality of the state court judgment for purposes of this Court's review. *Pope v. Atlantic Coast Line R.R. Co.*, 345 U.S. 379, 382-83 (1953); *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 215 (1977); R. Stern, E. Gressman, S. Shapiro, & K. Geller, SUPREME COURT PRACTICE, 151-59 (8th ed. 2002).

interpretation of *Liepelt*. As a result, employees and their employers now receive highly variable treatment in the calculation of federal damages awards depending upon the forum.

The payroll tax issue is significant and recurring. Since all railroad employees pay railroad retirement taxes, the issue arises in virtually every FELA case. It also arises in cases under similar federal statutes modeled on the FELA, such as the Jones Act, the Longshoremen's and Harbor Workers' Compensation Act, and the Death on the High Seas Act. Permitting some courts to ignore the effect of payroll taxes on future income streams destroys the uniform application of federal law. It also overcompensates the employees, by compensating them on a tax-free basis for sums that they would never have received if they had continued to work. This case is a particularly appropriate vehicle to consider these issues, in that the employee here not only received compensation for his taxes from which he was excused, but also was receiving substantial benefits from the Board to which the taxes would have been paid. For these reasons, review by this Court is both appropriate and necessary.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING THE USE OF NET, AFTER-TAX INCOME FOR COMPENSATORY DAMAGES

This Court has made clear that damages in FELA cases are determined by federal law. "It has long been settled that questions concerning the measure of damages in an FELA action are federal in character." *Liepelt*, 444 U.S. at 493. The Court has also taken a series of steps to assure that FELA damages can be calculated with precision. Thus, it has decided that taxes are not to be included, *Liepelt*, 444 U.S. at 493-96, spoken directly to the discount rate used for present valuation, *St. Louis Southwestern R. Co. v. Dickerson*, 470 U.S. 409, 411 (1985) (*per curiam*), and eliminated any

prejudgment interest, *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 335-39 (1988). "[O]nly if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361 (1952).

Among the uniform federal rules that this Court has established with respect to FELA cases is that FELA claimants should recover based on the "realistic measure" of their future income. *Liepelt*, 444 U.S. at 493. In *Liepelt*, this Court held that the trial court must instruct the jury that the FELA award is not taxable income. *Id.* at 498. It further held that wage loss consists of "the damages ... [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received." *Id.* at 493 (citation and internal quotation marks omitted). Because "[t]he amount of money that a wage earner is able to contribute to the support of his family is unquestionably affected by the amount of the tax he must pay to the Federal Government," it is his "after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family." *Id.* In *Liepelt*, the Appellate Court of Illinois had affirmed a state trial court's decision prohibiting the introduction of evidence showing how much income tax the claimant would have paid from his projected gross income. This Court reversed, holding that the evidence should have been presented in order to prevent "overcompensating the plaintiff." *Id.* at 498 (citation and internal quotation marks omitted).

This Court has already recognized that *Liepelt* is not limited to income taxes. In *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), this Court held that not only income taxes but any avoided costs (including such items as the purchase of uniforms) should be deducted from a claimant's estimated lost income. *Id.* at 534. *Pfeifer* was a

case arising under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), an analogous statutory scheme. The ruling in *Liepelt* has become a "federal common law rule," *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), designed to ensure that plaintiffs are treated fairly, but not overcompensated. *Id.* at 486-87. This Court has required trial courts to allow factfinders to hear evidence regarding deductions to gross future income streams in order to ensure that damage awards fully reimburse employees for their lost earning power, but do not "lead to the plaintiff recovering a windfall award." *Id.* at 487 n.16.

The Missouri decision below artificially limits this Court's holdings to deductions for self-described "income taxes." App. 7a. This contravenes the basic reasoning of these decisions. In the first place, railroad retirement taxes *are* a form of income tax. This Court has held that deductions under the Railroad Retirement Tax Act are, in fact, "[c]ompulsory federal taxes" on income. *Hisquierdo*, 439 U.S. at 582. The RRTA itself clearly imposes the tax "on the income of each employee ...." 26 U.S.C. § 3201. Second, it is undisputed that Ramsey's income prior to his injury was reduced by these mandatory federal railroad retirement taxes in the amount of 12.55%. This significant reduction in gross wages simply cannot be ignored in arriving at a realistic measure of his lost future income stream. Regardless of how railroad retirement taxes are characterized, permitting railroad employees to recover for these taxes results in overcompensation just as surely as allowing them to recover for the specific taxes at issue in *Liepelt*.

The unfairness is particularly apparent in this case. Here, the plaintiff was not only allowed to count his projected Railroad Retirement Board taxes as lost income. He was also able to exclude from the jury's consideration the fact that he

had income, not losses, from the Railroad Retirement Board. As a disabled employee, Ramsey qualified for and received a Railroad Retirement Board Disability pension. That pension, in the amount of $24,000, was four times larger than his annual Railroad Retirement Board tax payment.[3] The railroad argued that Ramsey had "opened the door" to the admissibility of this annuity from the Board by claiming Tier I and Tier II tax payments as a lost fringe benefit. The courts below refused to allow the jury to hear evidence about it. App. 11a. The erroneous resolution of that issue is fairly included in the question presented, since admission of the amount of disability annuity received from the Board would have been one means of mitigating the prejudice from the treatment of the Railroad Retirement Board taxes.[4]

In any event, given the disability pension, it is apparent that Ramsey was in no position to claim that his injury had

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[3] Ramsey, born in February 1950, will collect over $240,000.00 in disability pensions by the time he reaches the retirement age of 62.

[4] The court of appeals relied on *Eichel v. New York Cent. R.R. Co.*, 375 U.S. 253 (1963), which construed the Railroad Retirement Act as a "collateral source." However, these benefits are not "collateral," to the extent they are funded by BNSF. Plaintiff's expert admitted that the railroads fund two-thirds, or 66%, of Ramsey's disability benefits. In any event, Ramsey made this evidence probative in this case by claiming his railroad retirement taxes as a complete "loss," when in fact he was receiving benefits from the Board. *See McGrath v. Consol. Rail Corp.*, 136 F.3d 838, 841 (1st Cir. 1998); *Barrera v. E.I. DuPont DeNemours and Co., Inc.*, 653 F.2d 915, 920-21 (5th Cir. 1981) (holding proof of similar benefits would be relevant for impeachment purposes, even if the benefits constituted "a collateral source").

led somehow led to losses with respect to the tax payments. This was double or even triple counting in the extreme. It was patently inequitable for Ramsey to claim his excused liability for Railroad Retirement Board taxes *as a loss* and at the same time to conceal from the jury his receipt of disability pension benefits of $24,000.00 per year from the Board.[5]

This case also presents a desirable vehicle for reviewing the impact of railroad retirement benefits because the trial court refused to give any instruction to the jury on the subtraction of taxes. In direct violation of *Liepelt*, the trial court refused to grant BNSF's request for an instruction that would have directed the jury to use net, after tax income as the base for damages. App. 12a-13a. Thus, the jury did not receive evidence about the amount of the railroad retirement taxes, nor obtain any inkling that its verdict was supposed to reflect the realistic measure of losses required by *Liepelt*, 444 U.S. at 493.

The court of appeals' decision in this case represents a marked deviation from this Court's teachings. Because it will continue to affect countless FELA damage calculations, this Court should grant review.

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[5] Altogether, the actions taken by the Missouri courts could have caused an enormous overstatement of loss. With railroad retirement taxes at $6,000 per year and at least thirteen years from the injury until retirement, Ramsey could receive compensation for approximately $78,000 in taxes that he was excused from paying. He was also allowed to conceal his expected receipt of $240,000 in disability annuities from the Railroad Retirement Board, for a total overstatement of $318,000.

II. THE DECISION BELOW WIDENS THE CONFLICT AMONG THE COURTS.

A. The Courts Disagree About Whether Railroad Retirement Taxes Should Be Deducted In Order To Calculate Lost Wages Under The FELA

The proper treatment of railroad retirement taxes under the FELA is a question of recurring importance on which the state and federal courts have adopted conflicting views. For example, immediately after *Liepelt*, the Illinois appellate court from which that case had emerged applied this Court's decision in holding that a trial court had erred in excluding evidence demonstrating the impact of the railroad retirement taxes on the injured railroad worker's future lost income. *Oltersdorf v. Chesapeake & Ohio R.R. Co.*, 404 N.E.2d 320, 324-325 (Ill. App. Ct.), *appeal denied* (Ill. Sept. 29, 1980), *cert. denied*, 450 U.S. 920 (1981). Federal and state courts in Illinois have continued to follow this approach. *See White v. Indiana Harbor Belt Railroad Co.*, No. 96 C 7154, 1998 WL 323625, at *2 (N.D. Ill. June 12, 1998); *Edwards v. Atchison, T. & S.F. Ry. Co.*, 684 N.E.2d 919, 923-24 (Il. App. Ct. 1997).

Other courts have similarly held that, to arrive at net loss, railroad retirement taxes must be deducted from gross wages. In *Boston & Maine R.R. v. Talbert*, 360 F.2d 286, 291 (1st Cir. 1966), the First Circuit stated: "The evidence of [plaintiff's] income taxes and railroad retirement contributions were also properly excluded in determining the present value of [plaintiff's] expectancy in his earning capacity." In *Rachel v. Consol. Rail Corp.*, 891 F. Supp. 428 (N.D. Ohio 1995), the court held that railroad retirement taxes must be deducted as a matter of law in computing lost earnings in FELA actions. *Id.* at 430. *See also Phillips v. CSX Transp. Inc.*, 190 F.3d 285, 287 (4th Cir. 1999) (noting that the district court granted CSX's motion to reduce the

damage award as a matter of law because the award failed to take into account railroad retirement payroll deductions).

Appellate courts in Virginia, Minnesota and Georgia have reached the opposite conclusion. They have limited *Liepelt* to "income taxes" and refused to allow evidence of railroad retirement taxes in determining future streams of income. *See Norfolk & W. Ry. Co. v. Chittum*, 468 S.E.2d 877, 882 (Va.), *cert. denied*, 519 U.S. 1034 (1996); *Marynik v. Burlington N. Inc.*, 317 N.W.2d 347, 351 (Minn. 1982); *Norfolk S. Ry. Co. v. Perkins*, 481 S.E.2d 545, 548-49 (Ga. Ct. App. 1997), *cert. denied* (Ga. May 9, 1997); *see also Norfolk S. Ry. Co. v. Bradley*, 772 So.2d 1147, 1153 (Ala. 2000) (noting that the trial court did not instruct the jury that railroad retirement taxes would have to be deducted from any alleged future wage loss); *cf. Maylie v. Nat'l R.R. Passenger Corp.*, 791 F.Supp. 477 (E.D. Pa. 1992) (*Liepelt* inapplicable to railroad retirement taxes), *aff'd*, 983 F.2d 1051 (3d Cir. 1992).

Courts in Pennsylvania, Michigan and Missouri have adopted yet another view. They hold that the railroad retirement taxes can be counted as losses where the employee does not separately claim the retirement pension as a loss. *See Troy v. Nat'l R.R. Passenger Corp.*, No. 94-3943, 1995 WL 450276, at *7 (E.D. Pa. July 27, 1995), *aff'd*, 92 F.3d 1173 (3d Cir. 1996); *Berryman v. Consol. Rail Corp.*, Civ. A. No. 94-3668, 1995 WL 517642, at *4 (E.D. Pa. Aug. 28, 1995); *Sparklin v. Consol. Rail Corp.*, No. Civ. A. 94-3680, 1995 WL 455843, at *8 (E.D. Pa. Jul 28, 1995); *see also Ward v. Consol. Rail Corp.*, No. 234619, 2003 WL 21854866, at *9 (Mich. Ct. App. Aug. 7, 2003); App. 8a-9a.

The rulings in these cases were erroneously premised upon *Maylie v. Nat'l R.R. Passenger Corp.*, 791 F. Supp. 477 (E.D. Pa. 1992). *Maylie* involved a situation in which the plaintiff sought to present the value of his pension as an item of damages, and the railroad objected. "Here, ... plaintiff

describes the pension as a benefit that plaintiff has lost as result of his accident." *Id* at 487. As one court aptly pointed out, the *Maylie* "court refused to subtract *Plaintiff's* retirement tax contribution from the measure of his lost income *solely because* railroad did not agree to allow Plaintiff to show the *value* of his lost retirement annuity." *Rachel*, 891 F. Supp. 430.

In the subsequent cases, however, there is no indication that the railroad blocked proof of the value of a lost pension. Instead, the courts simply invoke *Maylie* on the ground that the employee had not sought to recover for his pension at all. This is entirely self-contradictory: if the employee is not seeking recovery for a lost pension, then he has no rationale at all for recovering for retirement taxes that he will never need to pay.

This case is, again, illustrative. Here, Ramsey never proffered any loss of a railroad retirement annuity pension as a lost item of damages, and the railroad never objected to such evidence. *See* App. 8a ("He made no claim for lost retirement benefits."). On the contrary, the railroad proffered Ramsey's actual disability benefit, and made no objection to any other showing by Ramsey. Thus, to the extent *Maylie* was invoked, it was inapplicable. Indeed, this *Maylie* strand of case law exemplifies the confused reaction to the problem. These courts are not inclined to allow a reduction in the amount of railroad retirement taxes, and are now extending *Maylie* beyond its original rationale to reach that outcome.

The decision of the court of appeals in this case thus deepens the confusion among the courts on a matter of substantial and recurring importance. The issue of whether to deduct railroad retirement taxes from the award arises in every FELA case where lost wages are awarded. It therefore annually affects thousands of railroad workers and dozens of interstate railroads and involves millions of dollars in unnecessary "compensatory" expenses. There are 251,075

employees in the railroad service industry today.[6] In 2002, the railroads paid $1.9 billion in railroad retirement board taxes, or more than 5% of their total operating revenues.[7] While injuries to railroad employees have gone down by 67% in the last two decades,[8] FELA lawsuits have more than doubled.[9] The railroad industry bears annual costs of approximately one billion dollars in connection with FELA claims.[10]

Moreover, Missouri is ranked seventh among the fifty States in total number of freight railroad employees and a significant number of FELA cases are filed there. The FELA has broad venue provisions that allow an employee to initiate suit in state or federal court in any jurisdiction that the defendant is located. Because the railroads operate in nearly every state, the plaintiffs end up with a broad choice of

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[6] Railroad Service in the United States, Association of American Railroads (2002), *available at* http://www.aar.org/PubCommon/Documents/AboutTheIndustry/RRState_USSummary.pdf (last visited June 29, 2004).

[7] Analysis of Class I Railroads, Association of American Railroads (2002), *available at* www.aar.org/pubstoresv2/data/analysis2002.xls (last visited June 29, 2004).

[8] *Railroads: The Safe Way to Move*, Association of American Railroads (Jan. 2004), *available at* http://www.aar.org/pubcommon/documents/policy/safetydramatic2004.pdf (last visited June 29, 2004).

[9] Association of American Railroads, 1999 Claim and Litigation Report 3-3 (2000).

[10] *See id.* at 2-7.

jurisdictions. In fact, Missouri is known to be a magnet for FELA suits involving out-of-state accidents.[11]

In short, the imperatives of national uniformity in the application of the FELA warrant review of this recurring and important issue.

B. The Decision Below Is Inconsistent With the Decisions Under Analogous Statutory Schemes

The role of payroll taxes in determining lost wages is not an issue limited to the railroad industry. Analogous federal remedial statutes govern other industries, and decisions such as the opinion below on railroad retirement taxes are inconsistent with the decisions of numerous federal and state courts with respect to Social Security taxes.

For example, the Jones Act is based upon FELA, and is to be construed in tandem with that statute. *American Dredging Co. v. Miller*, 510 U.S. 443, 454-55 (1994); 46 U.S.C. § 688(a). In Jones Act cases, the courts have confronted the question of whether social security payments should be deducted from awards.[12] The Fifth Circuit has held that the Jones Act requires that social security taxes be deducted from gross wages to reach net wages. *See Madore v. Ingram Corp.*, 795 F.2d 1210, 1218 (5th Cir. 1986); *see also Burden v. Evansville Materials*, 636 F. Supp. 1022, 1041 (W.D. Ky. 1986), *aff'd*, 840 F.2d 343 (6th Cir. 1988).

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[11] *See Hearing on S. 837 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 106th Cong. (June 9, 1999) (statement of Gerard T. Noce, Defense Research Institute), *available in* 1999 WL 386174.

[12] The court below recognized the similarities between railroad retirement and Social Security taxes. App. 7a.

The Louisiana state courts, though located within the Fifth Circuit, are in conflict with that circuit and with each other on this issue of federal law. *Compare Cappiello v. Exxon*, 695 So.2d 1097, 1105 (La. Ct. App.-4 Cir. 1997) (trial court erred as a matter of law in failing to deduct employee's contributions to social security in Jones Act action), *with Parks v. Pine Bluff Sand & Gravel Co.*, 712 So.2d 905, 918-20 (La. App.-3 Cir. 1998) (under Jones Act, employee's contributions to social security should not be deducted from his calculations of lost wages).

The same issue has arisen under other federal statutory schemes similar to FELA. The Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.*, and Death on the High Seas Act ("DOHSA"), 46 U.S.C. app. § 761 *et seq.*, permit injured parties to sue for compensation where their claims might otherwise be barred or impeded by the common law of torts. 33 U.S.C. § 905(b). The Fifth Circuit and other courts have held that social security taxes should be deducted from a LHWCA or DOHSA award. *See Hernandez v. M/V Rajaan*, 841 F.2d 582, 587-88 & nn.2-3 (5th Cir. 1988); *Tallentire v. Offshore Logistics*, 754 F.2d 1274, 1287 (5th Cir.), *rev'd on other gds.* 477 U.S. 207, *on remand*, 800 F.2d 1390, 1392 (5th Cir. 1986); *Sharian v. United States*, No. 98-4578, 2002 WL 31558047, at *3 (N.D. Cal. 2002); *Walden v. United States*, 31 F. Supp. 2d 1230, 1235 (S.D. Cal. 1998). While the New York state courts have followed this approach, *Escobar v. Seatrain Lines, Inc.*, 573 N.Y.S.2d 498, 502 (N.Y. App. Div. 1991), the New York federal district court has reached the opposite conclusion. *Roselli v. Hellenic Lines Ltd.*, 524 F. Supp. 2, 4 n.2 (S.D.N.Y. 1980).[13]

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[13] The leading treatise on damages reflects that social security taxes are to be subtracted from income figures in federal

(Continued ...)

Thus, the conflict presented here is not limited to FELA actions, but also exists under analogous federal statutory schemes. This Court has recognized that conflicting interpretations of analogous statutory schemes raise an issue worthy of this Court's review. *See, e.g., Begier v. IRS*, 496 U.S. 53, 57 n.2 (1990). Here, the conflict thwarts congressional intent that the measure of damages under these federal statutes be uniform regardless of the forum in which the suit is brought.

The issue is of real practical significance. In *Liepelt*, the Court believed that magnitude of the income taxes was sufficient to require an instruction even though such taxes amounted to only $2,100 per year, or 7.61% of plaintiff's gross salary. Today, railroad retirement taxes paid by the employee constitute 12.55% of the employee's gross earnings. For most Americans, this amount is larger than federal or state income taxes.[14] Accounting for railroad retirement taxes is thus an important issue in calculating damages in every FELA case.

In short, this petition presents this Court with an opportunity to resolve a conflict on a recurring issue of federal law. Over the last two decades, the state and federal

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actions. 1 *Stein on Personal Injury Damages*, § 3:12, at 3-34 (3d ed. 1997); *see also* Gerald E. Meunier, *Elements of Recovery In Maritime Personal Injury Cases*, 72 Tulane L. Rev. 805, 822-23 (Dec. 1997).

[14] For example, over the past decade, the average effective federal income tax rate for the first four quintiles of American taxpayers ranges no higher than 8.1%. GAO, *Effective Federal Tax Rates: 1979-2001* (April 2004), *available at* www.cbo.gov/showdoc.cfm?index=5324&sequence=0 (last visited June 29, 2004).

courts have adopted distinct and conflicting lines of authority in their efforts to apply this Court's decision in *Liepelt*. One position--adopted by the Fifth and First Circuits, two state courts and several federal courts--is that payroll taxes should be deducted from lost wages. A second position--followed by four state courts--is that such taxes should be deducted. The third position--followed by the court below and lower federal courts--holds that payroll taxes should not be deducted unless the plaintiff has asked to include the retirement benefits as a loss. This longstanding confusion concerning the proper application of the principles established in *Liepelt* can, of course, be resolved only by this Court. The compelling facts of this case present an appropriate context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 7, 2004

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION TWO

THOMAS RAMSEY,	)	No. ED82534
	)	
Respondent,	)	
	)	
v.	)	Appeal from the Circuit Court
	)	of St. Louis City
THE BURLINGTON	)	
NORTHERN AND SANTA	)	Honorable Patricia Cohen
FE RAILWAY COMPANY,	)	
	)	
Appellant.	)	Filed: February 3, 2004

OPINION

The Burlington Northern and Santa Fe Railway Company ("BNSF") appeals the judgment entered on the jury's $1.4 million verdict in favor of Thomas Ramsey on his FELA claim. We affirm in part and reverse in part.

I. BACKGROUND

Ramsey was a locomotive engineer for BNSF. On January 31, 2000, he reported to the BNSF yard shortly after 1:00 a.m. to take a coal train to an electric plant. It was a very cold morning--between 23 and 28 degrees--and there was precipitation on the ground at the yard. The weather and

associated safety hazards were discussed. Under BNSF's rules, locomotive engine walkways are supposed to be free of slipping hazards like ice and snow. It is the maintenance department's job to remove ice and cure any defects in and around the engines when the locomotives are in the yard. But there is not always someone from that department on duty at the yard; in those situations, the engineer and conductor are responsible for removing ice and snow. Calcium chloride and salt are kept at the yards for that purpose. BNSF also had a program to put calcium chloride containers on several thousand of its locomotives, including the one Ramsey was operating that day, but the container had not yet been installed on that locomotive.

On that morning, Ramsey checked to make sure everything onboard the engine was working properly and he inspected the outside of the train. Ramsey did not see any ice or snow. The conductor also said he was keeping an eye out for ice, but did not recall seeing any before they left. Ramsey and the conductor boarded the engineer side of the locomotive; they both said they would not have been on the conductor side before leaving the yard. They waited over an hour after boarding before they received the signal to depart.

During the trip, there was no ice, snow, rain, or sleet, but it was still very cold. When they arrived at the plant at about 4:00 a.m., the plant's switch was packed with ice and snow, preventing them from parking the train in its normal place for unloading the coal. Instead, the conductor got off the train on the engineer's side and into a transportation van to help guide the train as Ramsey backed it up and parked it in an unlit area.

After the train was parked, the van came around to the conductor's side of the locomotive to pick up Ramsey and the luggage. Ramsey had already taken one piece of luggage

off the engine and got back on to collect the rest. As he started to get off again, the conductor offered to help. When Ramsey attempted to hand down a piece of luggage to the conductor, he fell on the walkway of the engine. As he was lying there, Ramsey felt with his hand that there was ice on the deck. He had not seen it before and could not see it then. The light that normally illuminated the walkway was burnt out that morning, and it was still dark outside.

After he helped Ramsey into the van, the conductor went back to the train. He could not see anything in the dark or with the use of his lantern, but he felt with his foot "a slick patch of ice, and it was basically black ice, what you would see on a road from melted precipitation, then refreezing .... [I]t was not visible to the eye, especially at night. It wasn't white. It was just clear, and it was the same color as the deck of the engine." The conductor described the patch as six to eight inches wide and a foot long. BNSF's inspection of the train later that day revealed wet spots on the walkway, but no ice.

The fall caused a disc abnormality in Ramsey's back, for which he underwent surgery. The surgery decreased the pain, but he still experiences pain and discomfort from standing or sitting too long. It was recommended that Ramsey find work outside the railroad. At the time of trial, he was working part-time in a piano restoration shop.

Ramsey sued BNSF under the Federal Employers' Liability Act.[1] At trial, evidence of Ramsey's recent past wages was admitted, along with the amounts he paid in state and local income taxes. The trial court excluded evidence of

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[1] His claim that BNSF also violated the locomotive inspection act was disposed of on directed verdict.

the railroad retirement taxes Ramsey had paid and of the disability benefits Ramsey was receiving from BNSF. After plaintiff's case and again at the close of all evidence, BNSF moved for directed verdict based on the lack of any evidence that the railroad had knowledge of the ice on the deck. That motion was denied, and the jury returned its verdict in favor of Ramsey for $1.4 million. BNSF moved for new trial and to amend the judgment to reflect an offset for paid medical bills. These post-trial motions are deemed denied under Rule 78.06 because they were never ruled on. BNSF appeals.

II. DISCUSSION

A. Liability

In its first point, BNSF argues that it should have been granted a directed verdict because there was no evidence that the railroad knew or should have known about the ice on the deck.

We review the trial court's denial of a motion for directed verdict to determine whether the plaintiff made a submissible case. *Erdman v. Condaire, Inc.*, 97 S.W.3d 85, 88 (Mo. App. E.D. 2002). Granting a directed verdict is a drastic action that should be taken only when reasonable persons could not differ on the correct disposition of the case. *First State Bank of St. Charles, Missouri v. Frankel*, 86 S.W.3d 161, 169 (Mo. App. E.D. 2002). In making this determination, we view the evidence and all reasonable inferences therefrom in the light most favorable to the plaintiff. Erdman, 97 S.W.3d at 88. We presume the plaintiff's evidence is true and disregard any contrary evidence. *Id.*

To make a submissible FELA case, the plaintiff must show that (1) the railroad had a duty to provide a reasonably safe work place, (2) the railroad's lack of care played some part, however slight, in producing the injury and (3) the

injury was reasonably foreseeable. A "reasonably safe workplace" means that the employer is required to remove those dangers that can be removed by the exercise of reasonable care. *Qualls v. St. Louis Southwestern Railway Co.*, 799 S.W.2d 84, 86 (Mo. banc 1990). "Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury." *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 510, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957). Thus, a FELA case should be submitted to a jury if there is any evidence, however slight, to support the employer's negligence. *Euton v. Norfolk & Western Railway Co.*, 936 S.W.2d 146, 150 (Mo. App. E.D. 1996).

To satisfy the foreseeability element in a FELA case, the plaintiff must show that the railroad had actual or constructive notice of the defective condition that caused his injury. *Id.* at 151. Foreseeability is demonstrated by evidence that (1) the railroad was responsible, through negligence, for the presence of the unsafe condition, or (2) the railroad had actual knowledge of its presence before the accident, or (3) the unsafe condition had continued for a sufficient length of time to justify an inference that failing to know about and remove it was due to lack of proper care. *Id.* The railroad's knowledge or anticipation of the possibility that a general danger is present and that its standard of conduct is inadequate to protect its employees from that harm is all that is required to satisfy this element. *House v. Missouri Pacific Railroad Co.*, 927 S.W.2d 538, 540 (Mo. App. E.D. 1996).

Here, there was sufficient evidence under the liberal standards in FELA cases to show that BNSF knew or should have known that, based on the weather conditions, there could have been ice or snow on the deck of Ramsey's

locomotive. It is reasonable to infer that the ice was present on that train when it left the yard--there was precipitation on the ground there, and no other precipitation occurred during the trip. The "black ice" was not visible, but a jury could reasonably infer that if BNSF had sufficiently staffed the yard, then an inspection by the maintenance department may have revealed the presence of ice. Likewise, given that this type of ice is formed from melting and re-freezing, it is reasonable to infer that visible ice or snow was present at some point, which a jury could conclude was a condition that BNSF could have remedied with ordinary caution. Moreover, evidence that BNSF had instituted a program to equip locomotives with calcium chloride and that they had a rule requiring walkways to be free of slipping hazards demonstrates that it knew that ice was a hazard on locomotives. "The possibility of injury from a condition in the work place is what must be reasonably foreseeable, not knowledge of the precise injury and location." *Sanders v. National Railroad Passenger Corp.*, 930 S.W.2d 36, 38 (Mo. App. E.D. 1996); *see also Bailey v. Norfolk and Western Railway Co.*, 942 S.W.2d 404, 411 (Mo. App. E.D. 1997) (reasonably foreseeable that combination of conditions would adversely affect plaintiff's rest and could cause injury because possible health consequences of inadequate rest had long been available to railroad industry). Reasonable people could differ as to whether the railroad took sufficient care to protect Ramsey from the possibility of harm by this known hazard.

This is simply not one of "the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury." *Rogers*, 352 U.S. at 510, 77 S.Ct. 443. The case was submissible, and the motion for directed verdict was properly denied.

Point I is denied.

B. Railroad Retirement Taxes

In point two, BNSF argues that the court erred by refusing to exclude evidence of the railroad retirement taxes Ramsey paid because only after-tax income can be used to calculate future wage loss. We will not disturb the trial court's decision regarding the admission of evidence absent a clear abuse of discretion. *Fairbanks v. Weitzman*, 13 S.W.3d 313, 318 (Mo. App. E.D. 2000). We find no abuse of discretion here.

BNSF relies on *Norfolk and Western Railway Company v. Liepelt*, in which the United States Supreme Court held that evidence showing the effect of income taxes on the plaintiff's future earnings is relevant to the calculation of his future wage loss. 444 U.S. 490, 493-95, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980). It is the plaintiff's after-tax income, not his gross income, that is the proper measure of damages. Id. at 493. *Liepelt* involved only income taxes, however, and not railroad retirement taxes, which are of a different character. *See Maylie v. National Railroad Passenger Corp.*, 791 F.Supp. 477, 487 (E.D. Pa. 1992) (*Liepelt* inapplicable to railroad retirement taxes), *aff'd* 983 F.2d 1051 (3rd Cir. 1992). Railroad employees and employers pay these taxes into an annuity fund from which the Railroad Retirement Board, in accordance with the Railroad Retirement Act, administers disability and retirement annuities for eligible employees. *See* 45 U.S.C. section 231, *et seq.*; 26 U.S.C. sections 3201 and 3221. Part of the taxes is paid toward the disability and retirement annuities that supplant social security for railroad employees, and part is paid toward the annuity fund's pension component.

Because railroad retirement taxes are more akin to social security taxes than income taxes, BNSF also cites to *Madore v. Ingram Tank Ships, Inc.*, in which the Court held that

under *Liepelt* social security taxes should be deducted from a Jones Act plaintiff's lost income stream. 732 F.2d 475, 478-79 (5th Cir .1984). But the Court in *Madore* also expressly noted that a deduction for such taxes could be disregarded if there is some "articulated reason" to do so. *Id.* at 479. We think there is an articulated reason in this case, as expressed in *Maylie*.

In *Maylie*, the plaintiff presented evidence of his lost benefits, but did not include the contingent value of his pension. 791 F.Supp. at 488. The court held that where a plaintiff is not seeking lost railroad retirement benefits, railroad retirement taxes--which represent his contribution toward those benefits--should not be deducted:

> The value that the jury placed on plaintiff's lost future wages and benefits, therefore, did not include the value of his lost railroad retirement pension. It would be inappropriate to deduct from plaintiff's lost salary taxes that, in effect, represented plaintiff's contribution toward a pension without including, as an item of damages, the value of that pension. Because defendant did not consent to inclusion of the value of the pension as an item of damages, it was not error to refuse to reduce plaintiff's lost wages by the amounts he would have had to pay in railroad retirement taxes.

Id.

Here, Ramsey sought compensation for his lost future salary, unpaid medical bills and pain and suffering. He made no claim for lost retirement benefits. Thus, it was not an abuse of discretion to refuse the admission of what he would have had to pay in railroad retirement taxes. The other cases

on which BNSF relies are distinguishable because those plaintiffs sought compensation for lost future retirement benefits. *Rachel v. Consolidated Rail Corp.*, 891 F. Supp. 428 (N.D. Ohio 1995); *Adams v. Burlington Northern Railroad Co.*, 865 S.W.2d 748 (Mo. App. W.D. 1993).[2]

Point II is denied.

C. Disability Benefits

In its third point, BNSF contends that the court erred by excluding evidence that Ramsey was receiving monthly railroad disability benefits.[3] Again we find no abuse of discretion as to this evidentiary ruling. *See Fairbanks*, 13 S.W.3d at 318.

In *Eichel v. New York Central Railroad Co.*, the Supreme Court held that evidence that the plaintiff was receiving

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[2] In *Rachel*, the railroad sought to prevent plaintiff's expert from including retirement taxes as "fringe benefits" in his projected loss of earnings. 891 F. Supp. at 429. The court noted plaintiff's right to seek damages that reflect the loss of the larger annuity he would have received had he not been injured and had continued working at the railroad until his natural retirement. *Id.* at 429-30. But it found that the parties' tax contributions do not fairly represent the value of that loss and, therefore, plaintiff could not rely on those taxes as evidence the lost benefit. *Id.* at 430. Rather, evidence of the value of lost pension benefit should be calculated under the Railroad Retirement Act. *Id.* In *Adams*, the court held--in the context of the curative admissibility doctrine--that the employer's portion of retirement taxes would not have been admissible, upon proper objection, to prove the value of lost retirement benefits. 865 S.W.2d at 751.

[3] Ramsey notes that BNSF's offer of proof at trial on this point was insufficient. We will consider the point *ex gratia*.

disability payments under the Railroad Retirement Act was inadmissible. 375 U.S. 253, 254-55, 84 S.Ct. 316, 11 L.Ed.2d 307 (1963). The Court noted that those benefits "are not directly attributable to the contributions of the employer" and are "inadmissible to offset or mitigate damages." *Id.* at 254, 84 S.Ct. 316. Moreover, in that case, the likelihood of misuse by the jury clearly outweighed any value such evidence of "collateral social insurance benefits" would have had in showing plaintiff's motive for not continuing to work. *Id.* at 254-55, 84 S.Ct. 316.[4]

But if the plaintiff raises his financial condition and implies poverty or alludes to financial distress, then the defendant may rebut that evidence "by showing that other financial assistance was available." *Moore v. Missouri Pacific Railroad Co.*, 825 S.W.2d 839, 842-43 (Mo. banc 1992) (citing *Gladden v. P. Henderson & Co.*, 385 F.2d 480 (3rd Cir. 1967) and *Lange v. Missouri Pacific Railroad Co.*, 703 F.2d 322 (8th Cir. 1983)); *see also Leake v. Burlington Northern Railroad Co.*, 892 S.W.2d 359, 363 (Mo. App. E.D. 1995). In *Moore*, the Court approved admission of plaintiff's disability benefits when he injected his financial distress into the case by testifying that he could not afford to continue therapy. Id. at 842, 843. In *Gladden*, the plaintiff testified

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[4] BNSF argues in its brief that the Court in *Eichel* misunderstood the nature of railroad disability benefits; it claims that the rationale for the collateral source rule does not apply to these benefits since they are "primarily" funded by the railroad. The railroad made the same argument in *Giddens v. Kansas City Southern Railway Co.*, which our Supreme Court found was "foreclose[d]" by *Eichel*. 29 S.W.3d 813, 824 (Mo. banc 2000); *see also Rachel*, 891 F. Supp. at 430-31 (relying on *Eichel* to reject similar argument). We agree.

that the main reason he went back to work was to catch up on bills and support his family. 385 F.2d at 482. In *Lange*, the plaintiff claimed he was forced to return to work immediately after surgery because he had no money. 703 F.2d at 324.

Here, BNSF argues that Ramsey opened the door to admission of disability benefits by allegedly testifying in deposition before trial that he was seeking only volunteer work so as not to affect those benefits. This argument is wholly without merit, factually and legally. First, Ramsey did not testify as BNSF claims he did during his deposition. In fact, he expressly stated that the disability benefits had not prevented him from looking for a paying job, that he had made attempts to find a job and that he would rather be working. Ramsey made the statement to which BNSF refers in response to being asked if he planned to volunteer a few hours a week after finishing his hospice training: "... I'm planning on doing that. It won't affect my disability, you know, and I'm still busy." This statement does not imply poverty or allude to financial distress to evoke sympathy from the jury or increase the award. *See Leake*, 892 S.W.2d at 363. Not only does the statement lack any implication of Ramsey's financial condition, but it was made in a deposition that was not even offered into evidence or presented to the jury at trial. Thus, regardless of its meaning, it cannot be said to have opened the door to rebuttal evidence of Ramsey's disability benefits.

BNSF also claims that the disability benefits were admissible to rebut inclusion of the railroad retirement taxes in Ramsey's wage loss computation. The inclusion of that tax information in a damages computation is not analogous to the introduction of financial hardship evidence and does not open the door to collateral source evidence. *Adams*, 865 S.W.2d at 751. Nor is it admissible under the doctrine of curative admissibility. *Id.* at 751-52.

Point III is denied.

D. "After-Tax Income" Instruction

The trial court gave the jury Missouri Approved Instruction 8.02 regarding damages, which includes the statement that any award "is not subject to income tax." The court refused the following non-MAI instruction submitted by BNSF: "The measure of plaintiff's wage loss must be calculated from his after[-]tax income."

"[T]he propriety of jury instructions concerning the measure of damages in an FELA action is an issue of 'substance' determined by federal law." *St. Louis Southwestern Railway v. Dickerson*, 470 U.S. 409, 411, 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985). Accordingly, a party's contention that it is entitled to an instruction cannot be dismissed solely on the ground that the instruction is not found in MAI. *Id.; see also Kauzlarich v. Atchison, Topeka, and Santa Fe Railway Co.*, 910 S.W.2d 254, 257 (Mo. banc 1995); *Wilson v. Consolidated Rail Corp.*, 875 S.W.2d 178, 182 (Mo. App. E.D. 1994). "Whether such an instruction should have been given is a federal question." *Dickerson*, 470 U.S. at 411, 105 S.Ct. 1347.

Ramsey contends that MAI 8.02 as given is a correct and complete statement of the applicable law and, thus, no other instruction on the same subject can be given under Rule 70.02(b). BNSF argues that MAI 8.02 alone is insufficient under *Liepelt* because it only instructs the jury that its award is not taxable and fails to explain that taxes should not be included in the jury's calculation of Ramsey's lost future wages. In *Liepelt*, in addition to holding that income taxes were relevant and admissible for purposes of figuring plaintiff's future wage loss, the Supreme Court also held that it was error not to instruct the jury that its award would not be subject to any income tax. 444 U.S. at 496-98, 100 S.Ct.

755. MAI 8.02 reflects that holding. But the Court said nothing about instructing the jury about deducting income taxes from wage loss calculations; the holding regarding instructions dealt only with the taxability of the jury's award. *Liepelt* does not require that courts give the instruction BNSF proposes here, and BNSF has pointed to no other federal authority that does.

Moreover, even if BNSF was entitled to an instruction that Ramsey's future wage loss should be calculated based on after-tax income, BNSF has not shown any prejudice by the court's refusal to give that instruction in this case. Error in failing to give an instruction to which a party is entitled only warrants reversal if the merits of the action have been materially affected. *Giddens*, 29 S.W.3d at 819. First, of course, there can be no prejudice resulting from the failure to instruct the jury not to include railroad retirement taxes in its calculation of Ramsey's future wage loss since we have found that those taxes were not admissible in this case. Second, the amounts Ramsey paid in federal and state income taxes were introduced into evidence, and counsel for both parties argued for the jury to use Ramsey's after-tax income to determine his lost future wages. BNSF has pointed to nothing in the record to support the conclusion that because its instruction was not given the jury disregarded the evidence and arguments and included income taxes in its award.

Point IV is denied.

E. Excessive Verdict

BNSF argues that the verdict is excessive due in part to the alleged evidentiary and instructional errors that we have disposed of above. It also contends that improper testimony regarding the purpose of the railroad's safety rules resulted in an excessive verdict meant to punish BNSF. BNSF objected

to the "line of questioning" regarding the safety rules, but did not cite any legal basis for the objection and, in any case, the objection was sustained and the line of questioning ended. BNSF did not move to strike any of the testimony that had already been given by the time its objection was made. We decline to review the excessiveness of this verdict based on this unpreserved alleged error. *See Graham v. County Medical Equipment Co., Inc.*, 24 S.W.3d 145, 149 (Mo. App. E.D. 2000).

Point V is dismissed.

F. Offset for Medical Expenses

In its final point, BNSF contends that it is entitled to an offset for the medical expenses it has paid under the railroad's Health and Welfare plan. We agree.

In any FELA action, the railroad "may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought." 45 U.S.C. section 55. Setoff is permitted under this section for payments of benefits intended to indemnify an employer against liability under the FELA, but not for those fringe benefits that compensate employees for their work. *Folkestad v. Burlington Northern, Inc.*, 813 F.2d 1377, 1381 (9th Cir. 1987); *Clark v. Burlington Northern, Inc.*, 726 F.2d 448, 450 (8th Cir. 1984). The Health and Welfare Agreement between BNSF and its employees provides that any payment of benefits thereunder "will satisfy any right of recovery against the employing railroad for such benefits to the extent of the benefits so provided" and "will be offset against any right of recovery the employee may have against the employing railroad for hospital, surgical, medical or related expenses ...." The Ninth Circuit has held that "[t]he

railroads and the unions have thus agreed that benefits under the plan will satisfy FELA liability and that setoffs ... should be allowed." *Folkestad*, 813 F.2d at 1379. The purpose of this coverage clearly is to indemnify the employer against FELA liability, and payments made under the plan should be set off in accordance with 45 U.S.C. section 55. *Id.* at 1383; *see also Clark*, 726 F.2d at 450-51; *Burlington Northern Railroad Co. v. Strong*, 907 F.2d 707, 713-14 (7th Cir. 1990).

Point VI is granted.

III. CONCLUSION

The judgment is affirmed, except as to the amount of the judgment. The case is remanded with instructions to reduce the judgment by the amount of benefits Thomas Ramsey received under the Health and Welfare plan.

/s/_____
GLENN A. NORTON, Presiding Judge

KATHIANNE KNAUP CRANE, J. and MARY K. HOFF, J. concurring.

APPENDIX B

IN THE SUPREME COURT OF MISSOURI
SC85917
ED82534

January Session, 2004

Thomas Ramsey,

Respondent,

vs. (TRANSFER)

The Burlington Northern and
Santa Fe Railway Company,
Appellant.

Now at this day, on consideration of the appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Eastern District, it is ordered that said applicable be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session, 2004, and on the 27th day of April, 2004, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 27th day of April, 2004.

/s/ Thomas Simon Clerk

APPENDIX C

IN THE MISSOURI COURT OF APPEALS

EASTERN DISTRICT

TO: Attorneys of Record

FROM: Laura Thielmeier Roy, Clerk

Date: March 22, 2004

RE: Application For Transfer to Supreme Court Denied

1. ED82534 THOMAS RAMSEY, RES V BURLINGTON NOTHERN APP

MOTION FILED
JUL 29 2004

(2)

No. 04-44

IN THE
Supreme Court of the United States

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,
Petitioner,

v.

THOMAS RAMSEY,
Respondent.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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July 29, 2004

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IN THE

Supreme Court of the United States

No. 04-44

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Petitioner,

v.

THOMAS RAMSEY,

Respondent.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner, Burlington Northern And Santa Fe Railway Company, has consented to AAR's filing of a brief.* Respondent, Thomas Ramsey, has refused consent. AAR has recently learned that respondent has waived his right to file a response to the petition and, therefore, in order to facilitate this Court's prompt review of the case, AAR is filing its motion and brief early.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak.

* The letter expressing consent has been filed with the Clerk of the Court.

AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad industry as a whole—and in those instances such requests have been granted.**

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, a federal negligence statute that takes the place of workers' compensation in the railroad industry, presents such an issue. When AAR participates as *amicus curiae* in a FELA case like this one, it brings a broad, industry-wide perspective to the issue before the court. AAR works closely with its member railroads on a host of issues arising under FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 900 attorneys representing railroads nationwide in personal injury litigation. In addition, AAR conducts an annual survey of the FELA experience of its member railroads, and compiles and maintains the results. This represents, to AAR's knowledge, the most comprehensive database on FELA costs and trends in existence. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members in FELA litigation.

Because FELA litigation is an ongoing event for all major railroads–several thousand FELA suits are filed each year–AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability beyond FELA's intent. While an employer's obligations under FELA differ from, and in some ways are more substantial than, the obligations imposed on other employers, lower courts sometimes fail to acknowledge the principles that inform and limit FELA liability. Moreover, this problem is compounded by FELA's

---

** *E.g., Consolidated Rail Corp. v. Richards*, 124 S.Ct. 961 (2003); *National Railroad Passenger Corp. v. Griesser*, 534 U.S. 970 (2001); *Kansas City Southern Ry. Co. v. Giddens*, 532 U.S. 990 (2001); *Metro-North Commuter R.R. v. Buckley*, 519 U.S. 958 (1996). All granting motion of AAR to participate as *amicus curiae*.

liberal venue provision, which affords plaintiffs wide latitude in selecting the site of litigation, as well as the ability to bring and maintain an action in state court. Thus, aberrant state court decisions can have a far reaching impact. So long as Congress continues to keep this régime in place, railroads will avail themselves of their legal rights in an effort to limit their liability, and AAR will support those efforts.

As a trade association representing the nation's major railroads, AAR can play a valuable role in bringing the railroad industry's perspective to the Court's attention. In this case, the lower court, in a ruling that plainly is inconsistent with this Court's decision in *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490 (1980), has greatly increased railroad liability under FELA. This decision will impact a significant portion of the railroad industry, not just the individual railroad involved. Thus, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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July 29, 2004

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IN THE

Supreme Court of the United States

No. 04-44

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Petitioner,

v.

THOMAS RAMSEY,

Respondent.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 per cent of the rail industry's line haul mileage, produce 94 per cent of its freight revenues, and employ 92 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

One such matter is the Federal Employers' Liability Act (FELA), 45 U.S.C. §51-60, a tort-based law which provides compensation to railroad employees injured in the course of their employment. In 1908, Congress enacted FELA to provide a progressive remedy to railroad workers who, at the time, suffered a high rate of on-the-job injuries. *See* Interstate Commerce Commission, *Statistics of Railways in the United States 1908* (1909). Nearly a century later, despite the tort system having been long ago discarded as the means of compensating employees for workplace injuries,[2] FELA remains intact and results in a significant amount of litigation between railroads and their employees. Railroads spend substantial sums of money every year defending lawsuits in state and federal courts throughout the nation, and in payment of FELA settlements and judgments. Thus, precedents established in individual FELA cases are of interest to all railroads operating in the United States, particularly since the large railroads may be subject to suit in numerous jurisdiction.[3] Therefore, AAR has a long-standing history of working with its member railroads to develop legal precedent under FELA by, among other things, filing *amicus curiae* briefs in cases that raise issues of importance to the industry as a whole.

In addition to the impact of the decision below on the calculation of damages under FELA–itself an important issue

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[2] Subsequent to FELA's enactment every state enacted a workers' compensation law, under which concepts of negligence have been eliminated and insurance type benefits are provided to injured workers. *See* Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900-1930*, 41 J.L & ECON. 305 (1998). However, both railroad employees and seamen, by virtue of 46 App. U.S.C. §688, have a negligence-based remedy against their employer for work-related injuries.

[3] The four largest railroads, all members of AAR, each operate in more than twenty states. They are subject to FELA suits wherever they are doing business. 45 U.S.C. §56.

for the railroads–AAR has an interest in this case because it raises issues concerning the nature of the taxes that are levied as part of the railroad retirement system. Unlike most American workers who are covered by Social Security, railroads and their employees are covered by the Railroad Retirement Act of 1974 (RRA), 45 U.S.C. §§231-231u. The RRA establishes a system which provides retirement, disability, survivor and other benefits designed exclusively for the railroad industry, which are funded through the Railroad Retirement Tax Act, 26 U.S.C. §§3201-3241, and administered by the Railroad Retirement Board (RRB). Billions of dollars in benefits are paid to beneficiaries by the RRB each year.

Because of the magnitude of the program and its importance to both rail employers and employees, historically AAR has been actively involved in railroad retirement issues, representing its members before Congress and the RRB. AAR has developed a solid working relationship with the RRB (as have rail labor organizations), and has served on committees and task forces that have been formed to develop and offer recommendations to the RRB. A recent outcome of such an effort was the RRB's adoption, in toto, of recommendations modifying the RRB's disability regulations offered by AAR and representatives of rail labor. AAR also played a key role in the recent significant amendments to the RRA which, among other things, adjusted both the taxes paid into the system and the eligibility criteria for the receipt of benefits. Railroad Retirement and Survivors' Improvement Act of 2001, Pub. L. 107-90.

By excluding evidence demonstrating that respondent's future income would have been reduced by the deduction of railroad retirement taxes from his paycheck, the court below opened the door to FELA awards that far exceed the plaintiffs' actual losses, which many FELA plaintiffs will continue to pursue in jurisdictions that follow such a rule. This ruling will substantially increase the already high

damages paid by AAR member railroads under FELA and unjustly impose damages on railroads that have not actually been incurred by the plaintiff. Therefore, AAR and its members have a strong interest in this case.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in the Petition.

SUMMARY OF THE ARGUMENT

The ruling below, precluding petitioner from introducing evidence to show the amount of railroad retirement taxes that would have been deducted from respondent's future wages, is inconsistent with this Court's holding in *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490 (1980), and its underlying principle that a FELA plaintiff is entitled to recover damages for only the loss of wages that actually would have been received. This issue, which is the subject of conflicting rulings by lower courts, and which can have a significant impact on FELA damages, arises with great frequency in FELA litigation, and demands a uniform rule. The absence of a uniform rule on this important issue invites forum shopping by FELA plaintiffs.

The shorthand approach to calculation of FELA damages utilized by the lower court evinced a misunderstanding of the railroad retirement system and will serve to overcompensate many FELA plaintiffs. This overcompensation is exacerbated by the ability of respondent, and numerous other FELA plaintiffs, to conceal from the jury the fact that they are collecting a substantial disability benefit.

In addition to expanding railroad liability, the ruling below will hinder efforts to rehabilitate injured railroad employees. Allowing FELA plaintiffs to collect more money while they are off of work due to an injury than they would receive on the job will create an additional incentive for injured railroad employees to avoid rehabilitation and prompt return to employment.

ARGUMENT

I. THIS COURT SHOULD REVIEW THE ERRONEOUS RULING OF THE COURT BELOW ON AN IMPORTANT ISSUE RELATED TO THE PROPER MEASURE OF DAMAGES UNDER FELA

Simply put, the ruling below interpreted FELA as affording rail employees suffering a workplace injury an opportunity to collect more money while disabled than they would earn back on the job. Not only is this contrary to the teaching of this Court in *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490 (1980), it is inconsistent with sound compensation policy. Since the issue presented by the petition is potentially relevant in virtually every FELA case in which the plaintiff seeks damages for lost wages, a uniform rule is essential.

A. This Court's Precedents Call For a Uniform Rule Limiting Wage Loss Damages To The Plaintiff's Actual Out Of Pocket Losses

FELA is a unique compensation law in that it permits claimants to collect from their employer uncapped compensatory damages for both economic and noneconomic losses suffered.[4] Nonetheless, it clearly is not the purpose of the statute to make injured employees more than whole. Rather, with regard to wages lost as a result of a job-related injury, it is the intent of FELA that employees receive compensation for the actual pecuniary loss suffered. *Michigan Cent. R.R. Co. v. Vreeland*, 227 U.S. 59 (1913). Adhering to that principle, this Court ruled in *Liepelt* that a

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[4] *See Marchica v. Long Island R.R.*., 31 F.3d 1197, 1207 (2nd Cir. 1994); *Williams v. Missouri Pac. R.R.*, 11 F.3d 132, 135 (10th Cir. 1993). Other American workers, who are covered by state or federal workers' compensation laws, have a far more circumscribed ability to collect compensation against their employers for work-related injuries. See Part II.

FELA defendant is entitled to present evidence of the income taxes payable on the plaintiff's past and future income, and to have the jury instructed that any damages awarded the plaintiff are not subject to taxes. This assists the jury in determining accurately the plaintiff's actual pecuniary loss when awarding damages for past and future lost wages. As this Court noted, "[i]t is his after tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family." 444 U.S. at 493. Subsequently, in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), this Court reconfirmed that damages may be awarded only for loses that actually would be suffered as a result of the defendant's tortious conduct. (Damages should be based on "after-tax wages and benefits" and should not include costs "the injured worker will [no longer] incur." *Id.* at 534.)

Like all wage earners, in addition to paying income taxes, rail employees' earnings are subject to payroll taxes which are imposed as part of a system of federally-mandated benefits. Two distinct payroll taxes, known as Tier I and Tier II, are withheld from the paycheck of every railroad worker to fund benefits available under the RRA. The Tier I payroll tax is the same as the FICA tax under Social Security: earnings are taxed at a rate of 7.65 percent, with 6.2 percent for retirement benefits and 1.45 percent for Medicare hospital insurance. 26 U.S.C. §3201(a) and §3101(a) &(b).[5] Employees also pay 4.9 percent of their earnings in Tier II payroll taxes, which fund benefits that are over and above those available to Social Security recipients. 26 U.S.C. §3201(b).[6]

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[5] The retirement portion of Tier I is levied on earnings up to $87,900 in 2004; there is no earnings cap for the Medicare portion. U.S. Railroad Retirement Board Office of Program, Program Letter No. 2004-01 (Nov. 25, 2003) ("Program Letter").

[6] Tier II taxes are paid on earnings up to $65,100 in 2004. Program Letter. Under the 2001 legislation, after 2003, under certain circumstances

Though they are the largest single source of funding of railroad retirement benefits, the payroll taxes account for just under half of the financing of the railroad retirement system.[7] Other sources of financing are financial interchange transfers with the Social Security Trust Fund, investment income, federal income taxes on benefits, and general appropriations.[8]

The principle underlying *Liepelt* and *Jones & Laughlin*—that a plaintiff is not entitled to be made better off than he would have been if the work-related injury had not occurred[9]—requires treating railroad retirement payroll taxes in the same manner as income taxes for the purpose of calculating FELA damages. As with income taxes, the money paid in railroad retirement taxes is not available to rail workers to support themselves and their families, and thus serves to reduce the actual loss suffered when an employee can no longer earn a wage due to an injury. Therefore, failing

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the rate of Tier II taxes levied on employee earnings can drop below 4.9 percent. 26 U.S.C. §3201(b)(2)(B).

[7] U.S. Railroad Retirement Board, 2003 Annual Report 9 (2003). ("RRB Annual Report")

[8] *Id.* at 9-12.

[9] Lower courts adhere to this principle in assessing damages under FELA, requiring that damages may be recovered only for losses that would actually be suffered as a result of the defendant's negligence. For example, if a FELA plaintiff suffers an independent post-accident condition, which of itself renders the plaintiff disabled from working, the plaintiff cannot collect damages from the railroad defendant for lost wages occurring subsequent to that time. *Harris v. Ill. Cent. R.R.*, 58 F.3d 1140 (6th Cir. 1995); *Stevens v. Bangor & Aroostook R.R.*, 97 F.3d 594 (1st Cir. 1996). *See also Hamm v. Consolidated Rail Corp.*, 582 F.Supp. 906, 909 (E.D. Pa. 1983) (Since the plaintiff's job "was furloughed or abolished" right after his injury, even if the defendant's negligence had disabled the plaintiff during that time, a "de minimus" award for wage loss was appropriate.)

to take railroad retirement taxes into consideration when awarding compensation results in a windfall for the employee just as does failing to take income taxes into consideration.

Moreover, unlike income taxes, which vary with each employee's individual circumstances, the amount of railroad retirement taxes to be paid by each worker is fixed, and therefore easily ascertainable. Railroad retirement taxes are not affected by the number of dependents, deductions or credits available to the taxpayer, factors which can have a significant impact on the amount of income taxes that are owed. Thus, allowing introduction of evidence of railroad retirement taxes is a straightforward matter, and is less likely to result in "protracted expert testimony and debate" which the *Liepelt* Court recognized as a concern with income taxes. 444 U.S. at 494. In addition, because there is no equivalent to the Tier II tax under the Social Security system, total deductions for railroad retirement taxes from the wages of rail employees serve to reduce take home pay by a greater amount than do FICA taxes in the case of non-rail employees.[10]

There is absolutely no public policy reason why the principle applied by this Court in *Liepelt* with regard to income taxes should not apply with equal force to taxes paid to support the railroad retirement system. Nonetheless, as petitioner points out, there is a split among lower courts on this issues, with some faithfully applying *Liepelt* to railroad retirement taxes, some refusing to do so, and some holding that evidence of railroad retirement taxes may be excluded under certain circumstances. (See cases cited in Pet. at 13-14). Significantly, the reported cases explicitly addressing

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[10] Courts have held that evidence of the payment of Social Security payroll taxes, which are of the same character as railroad retirement taxes, may be presented to the jury. *Madore v. Ingram Tank Ships*, 732 F.2d 475, 479 (5th. Cir. 1984); *Tallentire v. Offshore Logistics, Inc.*, 754 F.2d 1274, 1287 (5th Cir. 1985).

this issue represent just the tip of the iceberg, since the issue must be addressed by the parties in every FELA case involving a significant injury.

During the past ten years an average of 5,850 FELA lawsuits were filed annually.[11] While in many cases the employee returned to work promptly, numerous FELA plaintiffs claimed substantial wage loss as a result of their injuries. A significant number of FELA plaintiffs allege that they are permanently disabled from returning to the workforce, and therefore seek to recover wage loss compensation covering the remainder of their work lives.[12] An employee earning wages at the average annual level of compensation in the railroad industry would have nearly $7,500 in railroad retirement taxes deducted from his or her paycheck each year.[13]

Given the stakes, litigation over the role of railroad retirement payroll taxes in the calculation of FELA damages is commonplace. Typically, railroads respond to attempts by plaintiffs' experts to inflate damage calculations by including railroad retirement taxes in the calculation of lost wages by filing motions in *limine*.[14] Legal wrangling over this issue

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[11] Data on FELA litigation is provided to AAR in response to an annual survey of AAR member and other railroads.

[12] Of about 10,000 FELA cases closed by four major railroads in 1994, the employee did not return to the job in about 1,300 cases. *See* GENERAL ACCOUNTING OFFICE, FEDERAL EMPLOYERS' LIABILITY ACT: ISSUES ASSOCIATED WITH CHANGING HOW RAILROAD WORK-RELATED INJURIES ARE COMPENSATED 54, n.4 (August, 1996). ("GAO FELA Report").

[13] The average annual compensation of Class I rail employees in 2002 was $59,650. Association of American Railroads, Railroad Facts 56 (2003 ed.). Class I railroads, which primarily constitute AAR membership, are those with annual revenues of $250 million or more. 49 C.F.R. Pt. 1201, 1-1(a) (2003).

[14] Counsel who represent AAR members in FELA cases have advised AAR that this practice occurs with regularity. *E.g.*, *Butcher v. Soo Line R.R. Co.*, No. TH 00-83-C-H/M (S.D. Ind. 2001)(Order on Defendant's Motion in *Limine*); *Williamson v. CSX Transp., Inc.*, No. 02-04834 CA

consumes the time and resources of the parties and the courts. Judges must be educated on the nature of railroad retirement taxes and the railroad retirement system. Thus, the issue presented by the petition is one which recurs with regularity, consuming judicial resources and, as petitioner points out, resulting in varying outcomes.

The current lack of uniformity on this issue also creates an incentive for forum shopping, a practice which is facilitated by FELA's liberal venue provision. FELA suits can be brought in state or federal court in any district where the railroad is doing business. 45 U.S.C. §56. As a result, a large number of suits may be filed in a single jurisdiction, despite little connection between the facts and circumstances of the underlying cases and the forum state.[15] Moreover, even though FELA is a federal statute, plaintiffs can ensure that their suits will be heard in state court if deemed advantageous. While there is concurrent jurisdiction between state and federal court, if the plaintiff chooses state court as the forum, the case cannot be removed. 28 U.S.C. §1445(a).

Not only does the combination of FELA's broad venue provision and prohibition on removal allow plaintiffs to choose from a wide range of forums, once a case is filed, it is relatively easy to keep it in the selected forum, as *forum non conveniens* motions typically are unavailing in many jurisdictions. Sixteen railroads do business in Missouri, the state where this case arose, including the four largest U.S. railroads. St. Louis is a jurisdiction perceived to be favorable for plaintiffs, and, as a result, attracts numerous FELA

(Cir. Ct. Fla. 2004) (Order on Defendant's Motion to Strike and Motion in *Limine*).(Copies of these orders are lodged with the Court by *Amicus*.)

[15] Some courts have held that FELA's venue provision justifies affording great flexibility to plaintiffs in selecting a forum, even beyond what might be appropriate for plaintiffs in general. *See Ford v. Burlington Northern R.R.*, 819 P.2d 169, 173-74 (Mont. 1991).

lawsuits. To keep FELA cases in St. Louis, a St. Louis doctor often is retained to "treat" the plaintiff. This will usually be enough to defeat a *forum non conveniens* motion even if the plaintiff neither lives nor was allegedly injured in Missouri.[16] Since a number of state courts have ruled similarly to the court below, plaintiffs will have ample opportunity to seek out jurisdictions that hold out the prospect of wage loss awards that exceed their prior take home pay.

This could be avoided through establishment of a clear rule on the proper role of railroad retirement taxes in the calculation of damages that all federal and state courts hearing FELA cases would apply in a uniform manner. *See New York Cent. R.R. v. Winfield*, 244 U.S. 147, 150 (1917) (FELA "create[s] uniformity throughout the Union, and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all states."); *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952). Until this Court issues such a ruling, the ruling below will serve as a further incentive for forum shopping and wasteful litigation.

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[16] *E.g., Jacobs v. Union Pacific R.R.*, No. 002-07409 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.)(Plaintiff resides and alleges injury in Illinois); *Branham v. Norfolk Southern Ry. Co.*, No. 002-06966 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.) (plaintiff resides in Illinois, alleges injury in Indiana) ; *Pasley v. Union Pacific R.R.*, No. 002-06931 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.) (plaintiff resides and alleges injury in Arkansas); *Lennie v. Union Pacific R.R.* No. 002-07896 (Twenty-Second Judicial Circuit Court, St. Louis, Mo.)(Plaintiff resides and alleges injury in Iowa). In all cases, the railroads' *forum non conveniens* motion was denied in March 2001, with the plaintiffs' receipt of medical treatment in St. Louis cited as a factor. (Copies of these orders were lodged with the Court by *Amicus* in *Norfolk & W. Ry. Co. v. Dye, cert. denied*, 533 U.S. 950 (2001).)

B. It Was Improper For The Lower Court To Assume That A FELA Plaintiff's Failure To Seek Recovery For The Potential Reduction Of Retirement Benefits Offsets The Taxes That Would Have Been Paid Out Of Future Wages

Faced squarely with the *Liepelt* decision, the court below (as have some other courts) made an effort to distinguish railroad retirement taxes from income taxes.[17] The court held that since respondent did not seek to recover for the reduction of his retirement benefits resulting from his inability to return to work and the consequent cessation of payment of railroad retirement taxes on his behalf, there was no need to reduce his wage loss by the amount he would have paid in railroad retirement taxes. This reasoning evinces a misunderstanding of the nature of railroad retirement taxes and railroad retirement benefits, suggesting that the amount the employee does not pay in railroad retirement taxes because he is no longer able to work is equivalent to the amount by which his benefits will be reduced upon retirement.[18] However, such a linear correlation between taxes paid and benefits received does not exist.

The amount payable to a beneficiary as a railroad retirement annuity is dependent on a number of factors, primarily the number of years of service, the age of the beneficiary when he or she retires, and the beneficiary's taxable railroad compensation, with the formula placing greater weight on the lower increments of earnings. Beneficiaries who choose to

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[17] The court below based its holding primarily on the decision in *Maylie v. National R.R. Passenger Corp.*, 791 F.Supp. 477 (E.D. Pa. 1992).

[18] One court mistakenly explained that "[t]he taxes paid by plaintiff into the railroad retirement fund are to fund his future retirement and are paid directly to him upon his retirement. Since the railroad retirement taxes would ultimately be paid directly to plaintiff upon retirement, we find no error with the trial court's exclusion of this evidence . . ." *CSX Transp., Inc. v. Levant*, 410 S.E.2d 299, 303 (Ga. App. 1991).

retire before the age that the RRA considers their "normal retirement age" receive benefits that are reduced in accordance with a formula. Tier I benefits, for the most part, are calculated like Social Security benefits and take into account the number of years of service both in the railroad industry and with a Social Security employer. Thus, the impact of having a railroad career cut short due to a disability on the size of the annuity received at retirement age is determined by the particular circumstances of the individual. As this Court has recognized, there is not necessarily a direct correlation between the amount of taxes paid and the amount of benefits received. *Hisquierdo v.Hisquierdo*, 439 U.S. 572, 574-75 (1979); *See also Adams v. Burlington Northern R.R.*, 865 S.W.2d 748 (Mo. App. 1993) ("Any link between the taxes paid and the benefits is too tenuous to provide a true measure of plaintiffs loss." *Id.* at 751).

The fact that in an individual case the plaintiff chooses not to seek compensation for the value of future lost benefits neither negates this Court's conclusion in *Hisquierdo* nor abrogates the principle enunciated in *Liepelt;* nor does it excuse trial courts from requiring that plaintiffs only recover for net wage loss. Depending on the circumstances, the amount that would have been paid in taxes by the employee may far exceed the value of lost retirement benefits resulting from the employee leaving the railroad workforce prior to normal retirement age due to an injury. Thus, a plaintiff might choose to forego seeking recovery of any lost retirement benefits if that creates the opportunity to recover a far greater amount representing the railroad retirement taxes that would have been paid. Courts should not countenance this approach to litigation. Rather, it is far more consistent with the compensatory nature of FELA to provide the jury with complete and accurate evidence of the plaintiff's net wages. With the plaintiff free to present properly calculated evidence

of lost future benefits, if any, the jury can then properly calculate the actual loss suffered. *See Rachel v. Consolidated Rail Corp.*, 891 F.Supp. 428, 430 (N.D. Ohio 1995). This Court has insisted that damages under a federal statute be calculated with reasonable accuracy, to the extent possible, and that courts should not utilize artificial shortcuts where relevant evidence is reasonably available.[19]

C. The Overcompensation Permitted By The Court Below Is Exacerbated In This And Numerous Other FELA Cases Since The Plaintiff Can Collect A Substantial Disability Benefit About Which The Jury May Not Be Informed

In addition to being permitted to seek recovery of the approximately $6,000 he paid annually in railroad retirement taxes as lost income, respondent also collects a sizeable annuity from the RRB. In reliance on this Court's decision in *Eichel v. N.Y. Cent. R.R.*, 375 U.S. 253 (1963), the lower court prohibited petitioner from informing the jury that respondent was collecting about $24,000 annually in railroad retirement occupational disability benefits. [See Pet. at 9a-11a] Not only did this enhance respondent's windfall, it undercuts the lower court's rationale.

In addition to retirement benefits, the railroad retirement taxes respondent and his employer pay also fund disability annuities, available to disabled rail employees who qualify on the basis of age and/or years of service. 45 U.S.C. §231a. Depending on the nature of the disability suffered, rail

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[19] In *Jones & Laughlin*, this Court rejected automatic application of a rule that presumed that future inflation and the discount rate would be equal and cancel one another. Rather than automatically permitting calculation of damages on a premise that might not be valid, lower courts were instructed that they need to make a deliberate choice based on an evaluation of the relevant factors. 462 U.S. at 552-53.

employees may qualify for one of two kinds of disability benefits. Employees who are unable to work at any regular employment may qualify for total and permanent disability benefits. 45 U.S.C. §231a(a)(1)(v).[20] Even if not qualified for total and permanent disability benefits, employees who are disabled from working in their regular occupation on the railroad may qualify for an occupational disability benefit. 45 U.S.C. §231a(a)(1)(iv).[21] The permanent and total disability benefit is funded by Tier I taxes; the occupational disability benefit is funded by Tier II taxes, and has no equivalent in the Social Security system. Thus, respondent was, in fact, reaping a substantial benefit from the payment of railroad retirement taxes prior to his injury, and will continue to do so until his normal retirement age without ever paying any additional taxes into the system.

Respondent's status as a double beneficiary is not uncommon among FELA plaintiffs, as many railroad employees receive RRB disability payments. In fiscal year 2002, 5,200 disability annuities were awarded to railroad workers, of which 4,100 were for occupational disability and 1,100 for permanent and total disability benefits.[22] During that period, the average monthly occupational disability benefit awarded was $2,242; the average monthly total and permanent disability benefit awarded was $1,339.[23] As of September 30, 2002, disability annuities were being paid to about 82,000 former railroad workers.[24]

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[20] To qualify for a total and permanent disability annuity an employee must have at least ten years of service.

[21] To qualify for an occupational disability annuity an employee must have either twenty years of service, or must be 60 years old with ten years of service.

[22] RRB Annual Report at 4.

[23] *Id.* at 18.

[24] *Id.* at 19.

The availability of a significant benefit to disabled rail employees, including those disabled from a work-related accident, undercuts the notion, implicit in the decision below and in some other lower court decisions, that the putative reduction of benefits due to the inability to work until normal retirement age offsets the gains realized by failure to deduct railroad retirement taxes in calculating wage loss. In fact, like respondent, many railroad employees can qualify for substantial benefits from the RRB without having to remain in the workforce until normal retirement age. Moreover, because juries generally may not be informed of the existence of this benefit, damage awards do not take into account the fact that the RRB is already compensating the plaintiff for the very injury for which a FELA award is sought.[25] In contrast, when a recipient of a Social Security disability benefit also receives benefits under a workers' compensation statute, federal law requires that the Social Security benefits be reduced to avoid the total payments rising above a certain level. 42 U.S.C. §424a. Permitting inclusion of amounts paid in railroad retirement taxes in the calculation of lost wages just exacerbates the problem of overcompensation courts have created under FELA.[26]

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[25] This case underscores the inherent inequity of prior rulings excluding evidence of receipt of railroad retirement disability benefits by FELA plaintiffs. AAR has filed *amicus* briefs in support of two petitions for certiorari seeking this Court's review of the application of the collateral source rule to the disability benefits collected by numerous FELA plaintiff. *Giddens v. Kansas City Southern Ry. Co.*, 29 S.W.3d 813, 824 (Mo. 2000), *cert. denied*, 532 U.S. 990 (2001); *Green v. Denver & Rio Grande Western R.R.*, 59 F.3d 1029 (10th Cir.), *cert. denied*, 516 U.S. 1009 (1995). The presentation of the tax issue in a case where the plaintiff is a disability annuity beneficiary makes this a particularly compelling case for review.

[26] Based on respondent's age and income, petitioner estimates that respondent could receive over $300,000 in damages above his actual out of pocket lost income. [Pet. at 12, n.5].

II. REFUSAL TO PERMIT INTRODUCTION OF EVIDENCE REGARDING THE IMPACT OF RAILROAD RETIREMENT TAXES WILL CREATE A DISINCENTIVE FOR EMPLOYEES TO RETURN TO THE JOB

Irrespective of the impact of the Missouri court's ruling on the damages railroads must pay in FELA cases, there is another reason why this Court should review the decision below. Failure to permit jury instructions and evidence related to the effect of railroad retirement taxes on wage loss is inconsistent with the important public policy goal of rehabilitating injured workers and returning them to productive employment.

The workers' compensation systems that cover the vast majority of other American workers set limits on the amount of compensation that can be recovered for lost wages, and generally do not allow recovery for pain and suffering.[27] Workers' compensation laws limit recovery for wage loss (disability) to a percentage of the employee's weekly wages, typically two-thirds.[28] In part, this is to take into account the effect of taxes in reducing the employee's take-home pay.[29] In addition, workers' compensation statutes further limit wage-loss compensation by capping weekly benefits, a limitation that does not apply to FELA.[30]

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[27] A. Larson & L. Larson, *Larson's Workers' Compensation Law* §1.03[4] & [5] (2004 ed.)("Larson").

[28] U. S. CHAMBER OF COMMERCE, 2004 ANALYSIS OF WORKERS' COMPENSATION LAWS 51-59, Chart VI (2004). ("U.S. CHAMBER")

[29] PETER M. LENCSIS, WORKERS' COMPENSATION: A REFERENCE AND GUIDE 57 (1998). As with tort awards like FELA, workers' compensation benefits are not subject to federal income tax. 26 U.S.C. §104(a)(1) & (2).

[30] *See* U.S. CHAMBER at Chart VI.

One reason workers' compensation systems establish limits on wage loss benefits is the widely accepted view that if compensation matches, exceeds, or even approaches, the employee's entire wage loss there will be little incentive to seek rehabilitation and to return to work promptly.[31] As the leading treatise explains "Practically all acts [] set a maximum in terms of dollars per week. . . . It was never intended that compensation payments [under workers' compensation] should equal actual loss, if for no other reason than that such a scale would encourage malingering." Larson at §1.03[5]. Moreover, rehabilitation is becoming an increasingly important part of workers' compensation programs. *Id.* at chapter 95. In some cases, workers' compensation benefits may be suspended when the employee refuses to cooperate with rehabilitation efforts. *Id.* at §95.04; Lencsis at 56.

On the other hand, although plaintiffs have a duty to mitigate damages, *Jones v. Consolidated Rail Corp.*, 800 F.2d 590, 593 (6th Cir. 1986); *Trejo v. Denver & Rio Grande W. R.R.*, 568 F.2d 181, 184 (10th Cir. 1977), FELA does not take into account the incentives that might be created by awarding full compensation.[32] FELA permits full recovery of wage loss, typically awarded in a lump sum and, as this case demonstrates, permits concealing from the jury receipt of an additional disability benefit. In fact, a compensatory damages

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[31] Meyers, Viscusi & Durbin, *Workers' Compensation and Injury Duration: Evidence From a Natural Experiment*, 85 AMER. ECON. REV. 322 (1995); Burton, *Disabled Workers' Compensation Programs: Providing Incentives for Rehabilitation and Reemployment*, 8 JOHN BURTON'S WORKERS' COMPENSATION MONITOR (No.4) 6 (1995) ("Most studies find that higher workers' compensation benefits lead to more workers' compensation claims and to longer duration of benefits. . . . higher benefits result in more workers missing work for longer spells of time, which may conflict with the objective of rehabilitation.").

[32] *See* GAO FELA Report at 25. *See also* Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79, 102-03 (Winter 1992).

award under FELA will be deemed excessive only if it "shock[s the] judicial conscience." *Schneider v. National R.R. Passenger Corp.*, 987 F.2d 132, 137 (2d Cir. 1993) ($1.75 million verdict, including over $1 million in intangible damages, not excessive.); *DeBiasio v. Illinois Central R.R.*, 52 F.3d 678 (7th Cir. 1995) ($4.2 million verdict not excessive.)

The already existing disincentive for employees aggressively to pursue rehabilitation under FELA is exacerbated by the ruling below. As a result of this ruling, rail employees are in a position not merely to recover their full take home pay, but also to collect amounts that would be deducted from their paychecks had they returned to the job. This creates a perverse financial incentive for able workers to claim a disability and for injured workers to remain disabled as long as possible. In the past, this Court has not hesitated to intervene to establish the proper method of calculating damages under FELA when lower courts have taken a wrong turn,[33] and this Court is well within its province to review a decision that enables rail workers to recover compensation that substantially exceeds their take home pay by remaining off the job.

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[33] E.g., *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988)(Prejudgement interest awards not permitted under FELA); *Liepelt; Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485 (1916) (Future damages must be reduced to present value).

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the petition for a writ of certiorari to review the judgment of the Missouri Court of Appeals in this case be granted.

Respectfully submitted,

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EDITOR'S NOTE

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No. 04-44

IN THE

Supreme Court of the United States

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Petitioner,

v.

THOMAS RAMSEY,

Respondent.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals

LODGING FOR THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

TERRY BUTCHER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cause No. TH 00-83-C-H/M
	)	
SOO LINE RAILROAD COMPANY,	)	
d/b/a CANADIAN PACIFIC RAILWAY,	)	
	)	
Defendant.	)	

ORDER ON DEFENDANT'S MOTIONS *IN LIMINE*

This matter is before the court on the Defendant's Motions *in Limine* and Brief in Support filed June 5, 2001. (Docket Item 30). Plaintiff filed its Response on July 9, 2001. (Docket Item 37). Defendant filed its Reply in Support of Its Motions *in Limine* on July 16, 2001. (Docket Item 40).

The defendant seeks an order excluding testimony as to three matters. They are:

(1) to exclude testimony from plaintiff's treating physicians with regard to "cause" of plaintiff's injury, the permanency of his "disability," and his "future pain and suffering" due to failure to provide a report required pursuant to Federal Rule of Civil Procedure 26;

(2) to exclude purported expert opinions of Dr. Lewis Grossman, Ph.D., concerning plaintiff's lost future wages, and his alleged impaired future earning capacity due to Dr. Grossman's failure to properly take into account certain taxes which would have been payable upon any future railroad earnings by plaintiff – namely, railroad retirement taxes which would have been deducted from plaintiff's gross earnings; and

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(3) to exclude reports and evidence of complaints concerning End of Train devices in locomotive cabs which post-date plaintiff's March 1998 incidents.

1. Exclusion of Dr. Schreiber's Opinions:

The plaintiff's complaint alleges two counts of negligence under the FELA and two counts of liability under the Boiler Inspection Act. All four counts are based on two incidents in which the plaintiff tripped over an End of Train telemetry device.

The plaintiff has identified Dr. Schreiber as one of plaintiff's "treating physicians" who will testify as to the cause and extent of plaintiff's injuries, disabilities, pain and suffering.

The defendant moves to exclude the testimony regarding the cause of plaintiff's injury, the permanency of his disability, and his future pain and suffering because Dr. Schreiber did not provide a report as required by Federal Rule of Civil Procedure 26(a)(2). The issue of whether a treating physician is an expert for purposes of Rule 26(a)(2) is an issue which courts and parties have been struggling with for some time. The most recent Seventh Circuit case cited to this court discussing the issue indicates that when a treating physician wishes to testify regarding the cause of a plaintiff's injury, he is attempting to testify as an expert and is required to comply with Rule 26(a)(2). *See Richardson v. Consolidated Rail Corp.*, 17 F.3d 213, 218 (7th Cir. 1994). The testimony of the treating physician which goes beyond his own observations to include opinions as to what caused the medical condition to occur and the length of time

for which the injury will continue to exist and cause pain are opinions which fall under Rule 702 of the Federal Rules of Evidence because they are scientific or other specialized knowledge which will assist the trier of fact to understand the evidence. Under Rule 26(a)(2)(B), a witness who is retained or specially employed to provide expert testimony in the case requires disclosure accompanied by a signed written report of the witness. While treating physicians certainly treat an individual and maintain records of that treatment, they do not, in this court's experience, agree to provide testimony in court cases unless they are specially employed to do so. Therefore, generally speaking, treating physicians who wish to give these types of opinions must file the necessary written disclosures.

However, Rule 26(a)(2)(B) further provides "except as otherwise stipulated or directed by the court," these disclosures must be made. In this case, the parties have stipulated in their Case Management Plan (Docket Item 10), at section III(e), that the provisions of Federal Rule of Civil Procedure 26(a)(2) do not apply to treating physicians unless the plaintiff was referred to the physicians by his attorneys, and that such witnesses are not expert witnesses within said rule.

In the materials provided to the court, Dr. Schreiber writes a letter indicating that he began caring for the plaintiff on March 15, 1999, approximately one year after the incidents in question. The letter does not establish whether the plaintiff was referred to Dr. Schreiber by his attorneys. If the plaintiff was not so referred by his attorneys, then

Dr. Schreiber is a treating physician, and by stipulation of the parties may testify notwithstanding the failure to provide the report.

If the plaintiff was referred to Dr. Schreiber by his attorneys, then the parties in their Case Management Plan appear to have contemplated that such expert testimony would be required to be supported by a Rule 26(a)(2) disclosure. He has not provided such a report.

What is the legal consequence of such a failure? Federal Rule of Civil Procedure 37(c) provides, in part:

> A party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial . . . information not so disclosed.

The plaintiff does not suggest that there is "substantial justification" for failing to disclose the information. When the parties prepared their Case Management Plan, they obviously contemplated that disclosures would be required of certain categories of witnesses, one of which was treating physicians who had been referred by the plaintiff's attorneys. The more difficult question is whether the failure is "harmless," as stated in the rule. The plaintiff does argue that the defendant was aware of the existence of the treating physician, and had copies of his records which contained the treating physician's opinions. The plaintiff further argues that the defendant had the opportunity to depose that treating physician, but declined to do so.

This court cannot conclude that the failure to provide the disclosures is harmless based on the information before the court. The purpose of Federal Rule of Civil Procedure 26(a)(2) is to require that an expert provide a report – prior to his/her deposition – that contains a complete statement of all opinions to be expressed and the basis and reasons therefor. He or she must also provide the data or other information considered by the witness in forming the opinions, exhibits to be used as a summary or in support of the opinions, and the qualification of the witness, among other things. The opposing party who has received notes of a treating physician which contain some opinions cannot be certain that those notes and records contain a complete statement of all opinions to be expressed and the reasons therefor, and may not be in a position to evaluate whether a deposition is warranted or not. The disclosures required by the rule do serve a purpose. That purpose is to determine when an expert must be deposed prior to trial, and when an expert opinion is so reasonably clear and based upon reasonable facts that no further deposition is necessary. The defendant's decision not to depose the physician in this case may have been made in part because all of the physician's opinions were not completely disclosed in his/her report.

The plaintiff also argues that the omission is harmless because the opinions of Dr. Schreiber parallel those of the defendant's physician, Dr. Coscia. However, the fact that there is other evidence on a particular issue does not, in this court's opinion, render failures to comply with the rules to be harmless. Each piece of evidence must be

evaluated according to its own merits. This court's full reading of the "worker's compensation note" by Dr. Coscia does not convince the court that Dr. Schreiber's testimony is merely cumulative of other evidence which will clearly be made of record before the jury in this case.

This court therefore concludes that if the plaintiff was referred to Dr. Schreiber by his attorneys, the defendant's motion *in limine* striking Dr. Schreiber's opinions as to causation and permanency of plaintiff's conditions should be granted. Federal Rule of Civil Procedure 37(c) provides that in addition to or in lieu of the sanction of denying the use of evidence at trial, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. The court notes that striking testimony is an extreme sanction which generally ought not to be employed if there are other available sanctions. In the event that the plaintiff files such a motion as required by the rule, and agrees to provide the appropriate disclosure in a timely fashion and to continue the trial date until such a point in the time as the defendant has reasonable opportunity to determine whether they wish to depose the physician and obtain rebuttal expert testimony, then the court may reconsider the granting of this motion.

Conclusion to Issue 1

The court is unable to resolve this portion of the defendant's motion *in limine* without further information. If the plaintiff was referred to Dr. Schreiber by the plaintiff's attorneys, then the defendant's motion *in limine* is **GRANTED.** In the event the

plaintiff was not referred to Dr. Schreiber by the plaintiff's attorneys, then the defendant's motion *in limine* is **DENIED.**

2. Dr. Grossman's Economic Testimony:

Lewis Grossman, Ph.D., prepared an opinion attempting to address the plaintiff's future wage loss. In creating that opinion, he failed to deduct out from the plaintiff's gross income Tier 1 and Tier 2 taxes that are withheld from the plaintiff's gross income. Dr. Grossman concludes that such withholdings are "not really a tax." (Tr. at 22). Dr. Grossman does, however, admit that the Tier 1 and Tier 2 railroad retirement pension contributions create a defined benefit plan. As such a defined benefit plan, the contributions which the plaintiff makes are not segregated in a particular account for his use only. Rather, they are, like social security, amounts withheld to fund the system generally.

Case law has concluded that railroad retirement taxes are indistinguishable from any other federally imposed tax, including social security taxes. *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 99 S.Ct. 802, 204-05 (1979) ("both employees and carriers pay a federal tax which funds a railroad retirement account. . . . [L]ike a social welfare or insurance scheme, the taxes paid by and on behalf of an employee do not necessarily correlate with the benefits to which the employee may be entitled. . . . [L]ike social security, and unlike most private pension plans, Railroad Retirement Benefits are not contractual. Congress may alter, and even eliminate them at any time." (Footnotes

omitted)); *Wallers v. U.S.*, 847 F.2d 1279, 1281 (7th Cir. 1988) (noting that the railroad retirement program is in lieu of the social security system, and that it is "funded through payroll taxes. . . .").

The parties do not contest that in determining the plaintiff's pecuniary loss, the correct measure of damages is the claimant's after-tax income, rather than his gross income before taxes. *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, *rehrg. denied*, 445 U.S. 972 (1980).

This court concludes that the opinion of Dr. Grossman which does not consider Tier 1 and Tier 2 contributions as "taxes," and does not calculate an "after tax" loss considering these contributions as taxes, is in error. Such an erroneous opinion will leave the jury confused because they will be given an incorrect measure of damages.

Conclusion to Issue 2

Dr. Grossman's opinion, which fails to properly take into account the effect of these taxes, will be misleading to the jury. The defendant's motion *in limine* with respect to his opinion is **GRANTED.**

3. Reports and Evidence Concerning End of Train Devices Which Post-Date Plaintiff's March 1998 Incidents:

The defendant moves to exclude any evidence or reference of safety meetings held on dates after the plaintiff's injuries. Defendant argues that safety concerns after

the incidents at issue are subsequent remedial measures and not admissible at trial under Federal Rule of Evidence 407.

The plaintiff argues that he brings claims under the Boiler Inspection Act ("BIA"). At issue under the BIA is whether or not the End of Train ("EOT") devises left on the cab floor result in a "tripping hazard." Plaintiff argues that subsequent complaints and discussions about the EOT devices left on the engine, and whether they are a tripping hazard, are relevant and probative of plaintiff's strict liability claim.

Federal Rule of Evidence 407 provides in its entirety:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion or evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The court concludes that minutes of safety committee meetings after the events in question are not admissible to prove "negligence" (under the FELA claim) or "culpable conduct" or a "need for warning or instruction" (under the BIA claim). At this time, the plaintiff has not demonstrated that there is any defense raised that the EOT devices were not owned or controlled by the railroad, nor has the railroad raised as a defense that it is not feasible to take any precautionary measures such as moving the devices to another location on the train. Under this state of the record, the defendant's motion *in limine* must be granted, at least conditionally. Should the railroad defend at trial on the basis

that there is no other feasible manner to store the devices, then the safety committee minutes may become relevant and admissible under the rule. However, until the defendant opens the door, no reference shall be made by counsel or the witnesses.

Conclusion to Issue 3

The defendant's motion *in limine* is **CONDITIONALLY GRANTED** as described above. The defendant is **DIRECTED** to bring copies of the minutes to trial so that they are available, if necessary.

SO ORDERED the 6 day of August, 2001.

William G. Hussmann, Jr., Magistrate Judge
United States District Court
Southern District of Indiana

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IN THE CIRCUIT COURT FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 02-04834 CA
DIVISION: CV-H

GLORIA V. WILLIAMSON, Individually
and as Executrix of the Estate
of CARL WILLIAMSON, deceased,

Plaintiff,

vs.

CSX TRANSPORTATION, INC.,

Defendant.
_____/

ORDER ON DEFENDANT, CSX TRANSPORTATION, INC.'S MOTION TO STRIKE AND MOTION IN LIMINE REGARDING TESTIMONY OF DR. ROBERT COSTON

THIS CAUSE came to be heard on Defendant, CSX Transportation, Inc.'s Motion to Strike and/or Motion in Limine regarding the testimony of Robert Coston, Ph.D. and the Court having heard reviewed the Motion and deposition of Dr. Robert Coston, heard argument of counsel and otherwise being fully advised in the premises, it is

ORDERED AND ADJUDGED:

1. This wrongful death lawsuit was brought under the provisions of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51 et seq. alleging that Plaintiffs decedent, Carl Williamson died as a result of esophageal cancer caused by his occupational exposure to asbestos during the course of his employment as a sheet metal worker/pipefitter for Defendant and its predecessor railroads.

2. Plaintiff timely disclosed an economic expert, Dr. Robert Coston, Ph.D., who formerly served as a Professor and Chairman of the Department of Economics at Georgia Southern University. Dr. Coston prepared an economic loss report and offered deposition testimony regarding damages suffered by Plaintiff as a result of the death of Carl Williamson. Defendant has not challenged the expert credentials of Dr. Coston.

3. Defendant moved to strike or limit portions of Dr. Coston, Ph.D.'s testimony based upon (1) Dr. Coston's failure to deduct Mr. Williamson's personal consumption expenses from his economic loss calcuktions; (2) Dr. Coston's failure to deduct Tier I and Tier II Railroad Retirement taxes from his past and future economic loss calculations; (3) Dr. Coston's use of U.S. Government statistics to calculate lost value of services and (4) Dr. Coston's calculation of lost fringe benefits based upon a percentage of Mr. Williamson's salary.

4. With respect to the issue of personal consumption, the Court finds that the decedent's personal consumption must be deducted from any economic loss calculations in a FELA wrongful death case. Norfolk & Western Railroad Company v. Liepelt, 444 U.S. 490, 62 L.Ed.2d 689, 100 S.Ct. 755 (1980); Matador v. Ingraham Tank Ships, 732 F.2d 475 (5th Cir. 1984); Tallentire v. Offshore Logistics, Inc., 754 F.2d 1274 (5th Cir. 1985); Kenney v. Tallulah Falls Railway Co., 105 S.E. 712, 26 Ga. App. 215 (Ga. App. 1921) and Davis v. Seaboard Air Line Railway Co., 80 S.E. 1078, 165 N.C. 99 (N.C. App. 1914).

5. The Court also finds that Dr. Coston, Ph.D. must deduct Tier I and Tier II Railroad Retirement taxes from his economic loss calculations.

6. In Norfolk & Western Railroad Company v. Liepelt, 444 U.S. 290, 62 L.Ed.2d 689, 100 S.Ct. 755 (1980) the United States Supreme Court held that net income after taxes is the true measure of damages in a FELA case.

7. Pursuant to the Railroad Retirement Act of 1974, 45 U.S.C. §231 et seq., the Railroad Retirement Board administers disability and retirement annuities for railroad workers. Under federal law, railroad employees and employers are required to pay a percentage of an employee's gross wages as Tier I and Tier II taxes in order to fund disability and retirement annuities for railroad workers. The Tier I and Tier II taxes supplant social security.

8. The Court finds that Dr. Coston, Ph.D. must deduct government mandated Tier I and Tier II Railroad Retirement taxes from his economic loss calculations and further finds that Defendant's portion of Tier I and Tier II taxes do not constitute a fringe benefit. Rachel v. Consolidated Rail Corp.. 891 F.Supp. 428 (N.D. Ohio 1995). The Court also finds that Mr. Williamson may have qualified for a larger pension benefit but for his death and will allow Dr. Coston to offer testimony regarding the value of Mr. Williamson's lost pension benefits, if calculated in a manner consistent with 45 U.S.C. §231b(b).

9. The Court disagrees with Defendant's contention that Dr. Coston must base his calculations for lost value of services on factual information specific to Mr. Williamson. Dr. Coston has assumed that Mr. Williamson would have provided ten hours of household services based upon published Department of Agriculture statistics for full-time workers. Defendant's argument goes to the weight of the evidence and not its admissibility.

10. With respect to the issue of lost fringe benefits, Dr. Coston assumed that Mr. Williamson's benefit package with Defendant had a value of twenty-five percent of Mr. Williamson's gross wages. There was no evidence supporting this assumption, although Dr. Coston did have a 1997 document prepared by Defendant suggesting that the cost of Mr. Williamson's medical and other benefits was $6,400. Under the FELA, Plaintiff would be entitled to recover the actual cost of replacing medical and other benefits provided by CSXT, assuming those benefits were terminated

as a result of Mr. Williamson's death. Dr. Coston, is not permitted to calculate the value of lost fringe benefits based upon a percentage of Mr. Williamson's salary unrelated to the actual cost of replacing medical and other benefits. Dr. Coston may use the $6,400 figure provided by CSXT as relevant evidence of the cost of replacing fringe benefits.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida this 23rd day of April, 2004.

/s/ JAMES L HARRISON
SENIOR CIRCUIT JUDGE
SUPREME COURT ORDER 2004R-041

Hon. James L. Harrison
Senior Circuit Judge

Copies furnished to:

Counsel of Record